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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

JONATHAN VARGAS-CRISPIN,

Defendant and Appellant.

2d Crim. No. B206506
(Super. Ct. No. 2005004625)
(Ventura County)

Jonathan Vargas-Crispin appeals the judgment following a court trial in which he was convicted of attempted premeditated murder (Pen. Code, §§ 664/187)¹ and first degree burglary (§ 459). The court also found true allegations that in committing the attempted murder appellant personally used a deadly weapon (a knife) (§ 12022, subd. (b)(1)), and inflicted great bodily injury under circumstances involving domestic violence (§ 12022.7, subd. (e)). He was sentenced to a prison term of life with the possibility of parole, plus five years. He contends the prosecution violated *Brady v. Maryland* (1963) 373 U.S. 83, by failing to disclose preliminary hearing testimony indicating that a knife was found outside the victim's condominium. He alternatively asserts that his trial attorney provided ineffective assistance of counsel by failing to impeach trial testimony that no knife was ever found. We affirm.

¹ All further undesignated statutory references are to the Penal Code.

FACTS AND PROCEDURAL HISTORY

Appellant began dating Janett P. in May of 2003. Approximately eight months into the relationship, appellant told Janett that if he ever saw her with another man he would kill her, the man, and then himself. On October 31, 2004, Janett ended the relationship due to appellant's controlling behavior. Although appellant told Janett that he respected her decision and agreed to remain friends, he subsequently called her several times seeking to restore their relationship. Janett told appellant that she was dating someone else and rebuffed his efforts to reconcile.

On February 10, 2005, appellant called Janett at 12:15 p.m. and told her he was going to Mexico to see his family. Appellant asked Janett about her new boyfriend, and she said they were doing well. Appellant then asked Janett if he meant anything to her. Janett replied, "To tell you the truth, no" and then hung up.

Janett came home from work at 9:15 p.m. that night. After briefly speaking with her boyfriend on the telephone, she went upstairs and put her 18-month-old niece to bed. As Janett was sitting on the floor by her niece's bed, appellant appeared with a kitchen knife in his right hand and repeatedly stabbed her in the stomach, neck, and back. During the ensuing struggle, appellant got on top of Janett and choked her into unconsciousness. When she woke up, appellant was gone. A trail of his blood was later found from the entryway of Janett's condominium to the parking area of the complex. Janett called 911, and the paramedics arrived shortly thereafter. Janett was transported to the hospital, where she underwent surgery and spent a week recovering from injuries that resulted in scarring.

Ventura Police Detective Cloyce Conway arrived at Janett's condominium that night at approximately 10:30 p.m. Detective Conway searched the interior and exterior of Janett's condominium, but did not find any knife that appeared to be the crime weapon. While the detective noticed that a knife appeared to be missing from a butcher block in the kitchen, Janett's brother Ruben testified that the knife was lost when he and Janett were moving into the condominium. Janett verified that no knives were missing

from the kitchen, although she did not recall Ruben telling her that the knife had been lost during their move.

At 10:40 p.m. the same night, appellant was found near a vehicle that had crashed into a tree off Alta Loma Road. The detective who responded to the scene of the accident determined that appellant had deliberately driven off the road in an attempt to commit suicide. Appellant was treated at the hospital for a cut to his right thumb. He was arrested the following day.

DISCUSSION

I.

At the preliminary hearing, Detective Matthew Harvill testified that a knife had been recovered from the bushes outside Janett's condominium. The detective also testified that the knife had been submitted to testing and that he was unaware of the results of those tests. Neither the knife nor the test results were ever produced to appellant in discovery. While appellant does not challenge the prosecution's failure to produce this evidence, he contends the prosecution committed a *Brady* violation by failing to produce a transcript of Detective Harvill's preliminary hearing testimony because the attorney who represented him at the preliminary hearing did not represent him at trial. We disagree.

Brady compels the prosecution to disclose information that is favorable and material to the defense, including information that could impeach prosecution witnesses. (*Brady v. Maryland*, *supra*, 373 U.S. at pp. 86-87; *In re Sassounian* (1995) 9 Cal.4th 535, 543-544, fn. 5; see also § 1054.1, subds. (d) & (e).) The prosecution does not have a duty, however, to provide evidence that is already in the defendant's possession or is available to him through the exercise of due diligence. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1134, overruled on another point in *People v. Doolin* (2007) 45 Cal.4th 390, 421, fn. 22.) Moreover, a *Brady* claim based on evidence that was known or available to counsel at trial is waived where counsel does not object below. (*People v.*

Carpenter (1997) 15 Cal.4th 312, 411, superseded by statute on another ground as stated in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106.)

While appellant notes that he was represented by a different attorney at the preliminary hearing, he offers no evidence demonstrating that his trial attorney did not obtain a copy of the preliminary hearing transcript. In addition, a copy of the transcript was available to trial counsel through due diligence. Under the circumstances, appellant waived his *Brady* claim by failing to raise his objection at trial. For the same reasons, the claim fails on the merits. "' . . . [T]he prosecution . . . does [not] have the duty to conduct the defendant's investigation for him. [Citation.] If the material evidence is in a defendant's possession *or is available to a defendant through the exercise of due diligence*, then . . . the defendant has all that is necessary to ensure a fair trial. . . .' [Citations.]" (*People v. Zambrano, supra*, 41 Cal.4th at p. 1134.) Appellant's claim also fails because the evidence at issue, i.e., Detective Harvill's testimony, was actually presented in the course of the proceedings, albeit at the preliminary hearing. (Compare *People v. Morrison* (2004) 34 Cal.4th 698, 713, 715 [no *Brady* violation where evidence was disclosed by detective's testimony at Evid. Code, § 402 hearing prior to penalty phase of trial].)

In any event, appellant fails to demonstrate that Detective Harvill's testimony was material to the determination of his guilt. "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." (*United States v. Bagley* (1985) 473 U.S. 667, 682.) Appellant asserts that the evidence would have aided him in persuading the trier of fact that his attack on Janett was not premeditated. He reasons as follows: "If [appellant] had the knife in his possession before he entered the condominium, such a fact would tend to show premeditation and deliberation. On the other hand, if he entered the condo without the knife, a trier of fact could reasonably infer that he began with the intent to confront Janett but not to assault her. If he then flew into a rage, grabbed the knife from the butcher block in the kitchen, and then ran up the stairs,

such a fact would tend to show malice but not premeditation and deliberation."

Appellant's reasoning is fundamentally flawed. First, he offers no evidence from which the trier of fact could have inferred that any knife found in the bushes was the one missing from the butcher block in Janett's kitchen.² On the contrary, both Janett and Ruben testified that no knife was missing from the butcher block. Moreover, the court stated that its finding of premeditation and deliberation would be the same whether appellant brought the crime weapon with him or obtained it from Janett's kitchen. In rendering its verdict, the court stated: "I don't find it to be particularly significant whether he used a knife from the kitchen or whether he brought the knife with him because the time that it would take to premeditate and deliberate does not necessarily need to be a great deal of time." The court went on to state its finding that appellant premeditated the crime while he walked up the stairs with the knife in his hand. Under the circumstances, appellant fails to demonstrate that Detective Harvill's preliminary hearing testimony was material to his defense. His *Brady* claim accordingly fails.

II.

Ineffective Assistance of Counsel

Appellant alternatively contends that his trial attorney provided ineffective assistance of counsel by failing to obtain a copy of the preliminary hearing transcript and thereafter failing to impeach Detective Conway's trial testimony that no knife had been found. To succeed on this claim, appellant must establish (1) that his attorney provided deficient representation, and (2) a reasonable probability that the result of the proceedings would have been different but for counsel's deficient performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 669.) Appellant fails to make either showing. He offers no evidence that his attorney did not obtain a copy of the transcript, much less that counsel provided ineffective assistance in failing to cross-examine Detective Conway on

² As we have noted, appellant does not challenge the prosecution's failure to produce the knife itself or the results of any tests conducted thereon. Rather, he merely challenges the failure to disclose Detective Harvill's testimony that a knife was found.

the issue. Counsel may have had a legitimate tactical reason for failing to question the detective on the issue. For example, testing on the knife in question may have revealed that it was not the crime weapon. Moreover, the trial court's remarks in finding that appellant committed the attack on Janett with premeditation and deliberation indicate that the result would have been the same even if the defense had somehow succeeded in establishing that the crime weapon came from Janett's kitchen. Under the circumstances, appellant fails to demonstrate that he is entitled to a new trial on the ground of ineffective assistance of counsel.

The judgment is affirmed.

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PERREN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

Edward F. Brodie, Judge
Superior Court County of Ventura

Diane E. Berley, under appointment by the Court of Appeal, for Defendant and Appellant.

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